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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE DANIELS,
Petitioner,

v.

CITY OF ARLINGTON, TEXAS AND THERON BOWMAN, CHIEF OF POLICE, ARLINGTON, TEXAS,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A General Order of the Police Department of Arlington, Texas prohibits officers from wearing symbols on their uniforms unless the symbol is approved by the Chief of Police in his personal, unfettered and unreviewable discretion. Sgt. George Daniels, a highly-decorated 14-year veteran of the force, chose to wear a tiny gold cross on his uniform shirt and asked the Chief for approval. Although he had allowed and even encouraged numerous other ornaments and pins to be worn in the past, the Chief refused to allow the cross. Daniels continued wearing the cross and was fired for insubordination. The Fifth Circuit held the General Order constitutional and found that Daniels' firing did not violate his First Amendment rights of free speech, association or freedom of religious expression. Petitioner presents the following questions:

1. Is the *Pickering* standard for determining the existence and scope of a public employee's right of free speech applicable to symbolic religious speech?

2. Is the *Pickering* standard applicable where a supervisory official enjoys unfettered discretion to censor or permit any form of symbolic speech by an employee of his department, including matters of "public concern" such as religious speech?

3. Does the "incidental effect" test of *Oregon Employment Div. v. Smith* apply to a claim of religious discrimination in government employment, where the presence of free speech, free exercise and right of association claims amounts to a "hybrid right," and where numerous exemptions to a uniform policy are granted for non-religious reasons, making administration of the order a "system of individualized exceptions?"

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There are no known parent or subsidiary entities to these parties.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

GEORGE DANIELS respectfully petitions this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in *Daniels v. City of Arlington, Texas, et al.*, decided on April 9, 2001 and reported at 246 F.3d 500, affirming the decision of the United States District Court for the Northern District of Texas that granted summary judgment in favor of Respondents as to all claims and all parties.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Daniels v. City of Arlington*, dated April 9, 2001, is reported at 246 F.3d 500 and set forth in Appendix A. The unreported order of the Fifth Circuit denying reconsideration and *en banc* review, dated May 1, 2001, is set forth in Appendix B. The unreported memorandum opinion of the United States District Court for the Northern District of Texas, granting summary judgment to Respondents, dated October 6, 2000, is set forth in Appendix C. The unreported memorandum opinion of the District Court denying partial summary judgment to Petitioner, dated September 21, 2000, is attached as Appendix D. The unreported Judgment of the District Court, dated October 6, 2000, disposing of all claims as to all parties hereto, is attached as Appendix E.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Fifth Circuit was entered on April 9, 2001. Appendix ("App.") at A1.

A petition for rehearing *en banc* was considered as a petition for reconsideration and overruled by the Fifth Circuit on May 1, 2001.[1] Thus, Petitioner had until July 30, 2001 to file this Petition.

The opinion and Final Judgment of the District Court were entered on October 6, 2000. The Final Judgment disposed of all claims and all parties to the proceeding below, and hence constituted a final judgment within the meaning of FED. R. APP. PROC. 4(a)(1)(A). Timely Notice of Appeal was filed by Petitioner on October 13, 2000.

The Supreme Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONST. AMEND. I, Freedom of Speech, Press and Association:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[1] Under SUPREME COURT RULE 13.3, the Fifth Circuit treats petitions for rehearing *en banc* as petitions for rehearing. LOCAL RULE INTERNAL OPERATING PROCEDURE FOR THE FIFTH CIRCUIT, LOCAL RULE 35, Handling of Petition by the Judges; Panel Has Control: "A petition for rehearing *en banc* is treated as a petition for rehearing by the panel if no petition is filed."

42 U.S.C. § 1983, Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

Introduction.

Sergeant George Daniels, a highly-decorated sergeant in the Arlington Police Department, wanted to wear a tiny gold cross on his uniform shirt as a symbolic statement of his Christian beliefs. Daniels requested that the Chief exercise his discretion to allow Daniels to wear his cross pin, as he had for several other non-religious symbolic adornments. The Chief refused Sergeant Daniels's request. Daniels then began wearing the pin anyway. The Chief told Daniels to remove the pin from his shirt or face termination. Daniels declined to remove the cross and was fired for insubordination.

Petitioner George Daniels raises two constitutional issues in this action. First, he asserts a "facial" challenge, arguing that Arlington Police General Order 205.02(C)(2)(c) is unconstitutional because it grants unfettered discretion to a government official to decide,

based solely on content, the nature of permissible speech that may be engaged in by citizens who are public employees.[2]

Second, Petitioner asserts an "as-applied" challenge, alleging he has been the victim of intentional religious discrimination. Petitioner presented evidence showing Chief Kunkle previously allowed numerous other types of pins and ribbons to be worn on the uniform shirts of Arlington police officers, but censored Petitioner's speech purely based on its religious content. All such evidence was ignored by both the District Court and the Court of Appeals.

Based on the above, Petitioner asserts a violation of his civil rights, and that he was wrongfully discharged from his job in violation of the First Amendment, Title VII and Texas state law, and is thus entitled to judgment of wrongful discharge and commensurate damages.

Factual History.

The following facts were proved by the submission of the Petitioner in the trial court below, and are substantially uncontroverted by Respondents.

Petitioner George Daniels was employed by the City of Arlington, Texas as a police officer on August 5, 1985. He was, and is, a devout evangelical Christian. R.A. at 116. As part of his faith, Sgt. Daniels believes he is obligated to proclaim the Lordship of Jesus Christ to everyone he meets. As a police sergeant, Daniels held positions that required him to wear departmental uniforms as his regular working attire. R.A. at 117.

In accordance with his religious beliefs, Sgt. Daniels chose to wear a tiny, 1/4-inch gold cross on his police uniform shirt as

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[2] See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990), authorizing facial constitutional challenges in cases such as this one.

symbolic speech conveying his status as a Christian. Daniels believed that wearing the cross allowed him to symbolically proclaim his faith and reach out to others in his community, to fulfill his commitment to Christ, and to identify and thus associate with other Christians holding the same beliefs.

Arlington Police Department General Order No. 205.02(C)(2)(c) provides:

> No button, badge, medal, or similar symbol or item not listed in this General Order will be worn on the uniform shirt unless approved by the Police Chief in writing on an individual basis.

R.A. at 117 (hereafter "General Order"). A Christian cross is not a listed item in the General Order. There exist no guidelines – written or unwritten, official or unofficial – for the exercise of the Chief's discretion while implementing the General Order. Instead, the General Order expressly allows Arlington's police chief to exercise his unfettered discretion in deciding, on a case-by-case basis, what pins or other ornamentation can be worn on the uniform shirts of officers in the department. R.A. at 597.

Chief David Kunkle previously allowed and encouraged officers in his department to wear various forms of ornamentation not listed in the general order, including DARE ("Drug Abuse Resistance Education") and other anti-drug program pins, CLEAT (*i.e.*, union) pins, Mexican flag pins, red ribbons, and Russian/Muscovite police pins. R.A. at 435, 482-84, and 534-35. The red ribbons were supplied to the department by a community group, the Arlington Medical Auxiliary, to commemorate the slaying of Federal Drug Agent Enrique Camerena. *See* Appendix G, Arlington Police Department Informational Memo from Police Chief Kunkle regarding "Red Ribbon Week." dated October 19, 1990. Chief

Kunkle stated officers were "encouraged to wear or display a red ribbon during the week to show their support for Red Ribbon Week and their commitment to lead a drug-free lifestyle." *Id.*

At a Non-Supervisory Employee Representatives' Meeting on January 9, 1997, officers were instructed as follows:

> Earrings, Knives, and Pins: ....As to pins or other uniform accouterments, only those items specified in General Orders are permitted. Deputy Chief Shipp is having a survey conducted to see what officers have been wearing (which now must be removed) and all items will be reviewed by command staff to determine whether or not they will be allowed on a case by case basis. *Police officers must accept that their appearance must be professional and neutral and inoffensive to public sensibilities. Even seemingly inoffensive religious symbols are not to be worn where they can be viewed by the public because they may indicate to others hostility to their own religious beliefs.*

See Appendix F.

In January 1998, Daniels began the process of seeking formal approval from the Chief to wear the cross as an exception to the "no pins" policy. On July 1, 1998, Daniels had a conference with the Chief in which he asked for permission to wear the cross on his uniform shirt. The Chief acknowledged in testimony that he could have granted Daniels's request as an exception to the "no-pins" policy had he simply chosen to do so. R.A. at 494-96. Instead, the Chief refused to grant Daniels an exception to the policy, stating that he believed the cross "might offend someone," and that he wanted his officers to remain "neutral," presumably as it related to religious-oriented speech and appearance. R.A. at 126, 435-36.

Daniels chose to wear the cross on his uniform shirt anyway because to remove it, for him, would be a public denial of his faith, and because he believed the Chief's refusal to grant his request infringed his right to free expression and was thus not a "lawful" order he was duty-bound to obey. R.A. at 118.

On August 10, 1998, the Chief issued a memorandum to Daniels telling him to remove the cross from his uniform. Daniels continued to believe this admonition from the chief was not a "lawful" order, and he refused to obey it. On August 24, 1998, the Chief issued a second memorandum to Daniels, this time threatening Daniels with termination from the department for insubordination if Daniels refused to comply. Again, believing this order was not a "lawful" order, Daniels declined to obey it. *Id.*

In September 1998, the department began formal disciplinary proceedings which ultimately resulted in Daniels' termination from the police force. The sole basis for Daniels' termination was his refusal to quit wearing the cross on his uniform, and his refusal to obey orders requiring him to cease that activity. R.A. at 13, 139.

In the District Court, Respondents offered no evidence that the wearing of a tiny gold cross such as that worn by Sergeant Daniels in any way interfered with the operations or mission of the police department, implicated public policy or safety concerns, or otherwise disparaged the name, position, abilities, authority or fairness of the person wearing it or of the police department as a whole. On the other hand, Sergeant Daniels offered credible proof that the Chief singled out religious speech for special, discriminatory treatment. R.A. at 440, 482-84, and 534-35.

Procedural History.

Daniels filed the action below against the City and the Chief of Police.[3] He sued for violation of his federal rights under the First and Fourteenth Amendments to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985(3), and Title VII of the 1964 Civil Rights Act, § 2000e *et seq*. He also brought state law claims for wrongful termination based on the City's violation of the TEXAS CONSTITUTION, Article I, §§ 3, 3a, 6 and 8, and for violation of the Texas Commission on Human Rights Act, TEXAS LABOR CODE ANN. § 21.001 *et seq*., which prohibits intentional discrimination in employment based on religious practices and beliefs. Sergeant Daniels sought a declaratory judgment that Arlington General Order 205.02(C)(2)(c) was unconstitutional on its face and as applied, as well as monetary damages in the form of back pay, front pay, pre-judgment and post-judgment interest, and attorney's fees and costs.

The case was initially filed in Texas State District Court. Before proceedings commenced in state court, the case was removed to the United States District Court under federal-question jurisdiction, 28 U.S.C. § 1331. The District Court dismissed all of Daniels's claims by granting the City's motion for summary judgment. App. C. The court rejected Petitioner's claim of overbreadth by incorporating its earlier order denying Petitioner partial summary judgment on that issue. App. D.

Petitioner timely appealed to the Fifth Circuit, which affirmed the judgment. App. A. The appeals court ruled that Sgt. Daniels' symbolic use of the cross to express his faith was not a "matter of public concern" within the meaning of *Connick v. Myers*, 461 U.S.

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[3] Respondent Police Chief Bowman was named a defendant as the successor to Chief David Kunkle.

138 (1983). 246 F.3d at 503-04. "The content of [Daniels'] speech – symbolic conveyance of his religious beliefs – is intensely personal in nature." *Id.* at 504. "Its form melds with the authority symbolized by the police uniform, running the risk that the city may appear to endorse Daniels's religious message." *Id.* The court also credited the District Court's conclusion that "the no-pins policy does not target religion but only incidentally affects Daniels' individual religious practice, and thus is acceptable under *[Employment Div. v.] Smith.*" *Id.* at 505. For similar reasons, the Fifth Circuit rejected Petitioner's Title VII claim, holding that Sgt. Daniels failed to demonstrate that reasonable accommodation was not offered. *Id.* at 506.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUIT COURTS OVER THE APPROPRIATE STANDARD FOR DETERMINING WHETHER SYMBOLIC SPEECH BY A PUBLIC EMPLOYEE "MATERIALLY AND SUBSTANTIALLY INTERFERES" WITH THE EMPLOYER'S FUNCTION

For over thirty years it has been settled law in a number of different speech contexts that if "there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the [government agency],' the prohibition cannot be sustained." *Tinker v. Des Moines ISD*, 393 U.S. 503, 509 (1969), citing to *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

> Even the exercise of religion may be at some slight inconvenience in order that the state may *protect its citizens from injury*.... The state is likewise free to regulate the time and manner of solicitation generally, *in the interest of public safety, peace, comfort or convenience.*

Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (emphasis supplied). This Court has further held that the censor bears the burden of proof to show constitutionality (*i.e.*, a strong justification for censorship) once a *prima facie* case of constitutional impact is made. *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965).

The Arlington General Order exemplifies a constitutional infirmity found in other prior restraints reviewed by this Court: there is no evidence showing any real threat to the administration or mission of the government justifying the restraint. Because of this, it invites discrimination – however tacit and subtle – against viewpoints expressed by particular symbols, such as the religious viewpoint expressed by Sergeant Daniels' cross pin.

The Fifth Circuit's approach to symbolic speech by uniformed public employees is in direct conflict with that of the Eighth Circuit. In a case directly on point, the Eighth Circuit upheld the right of firefighters to exercise their constitutional freedoms at work. In *Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994), several uniformed firefighters were suspended from work for refusing to remove American flag pins from their uniform shirts. The federal district court upheld the suspensions on summary judgment. The Eighth Circuit reversed, finding that the city failed to show how wearing the pins disrupted the workplace or otherwise negatively impacted any legitimate governmental interest. 40 F.3d at 293. The Eighth Circuit also held summary judgment inappropriate because fact issues concerning motive and intent of the employer existed in the case. *Id. Cf. Waters v. Churchill*, 511 U.S. 661 (1994) (plurality)

(reversing summary judgment for factual determination whether employee was fired for protected or unprotected speech). Moreover, the Eighth Circuit rejected the notion that an unconstitutional order could be grounds for dismissal:

> While the District portrayed the crucial conduct as insubordination, earlier case law persuades us that we must go further and examine the propriety of the order Dunn disobeyed.... [T]he Eleventh Circuit [had] held that refusing to obey an order that implicates an employee's First Amendment rights is not a sufficient reason for disciplining the employee, even in a paramilitary organization such as a police or fire department [citing *Leonard v. City of Columbus*, 705 F.2d 1299, 1303-05 (11th Cir.), *cert. den.*, 468 U.S. 1204 (1984)].

Dunn, 40 F.3d at 291. There thus exists a conflict between the Circuits on the issue of application of the standards set forth in *Pickering v. Bd. of Educ. of Will Township*, 391 U.S. 563 (1968) and *Waters*, *supra*, to symbolic expression by uniformed municipal officers. SUPREME COURT RULE 10(a).[4]

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[4] *Daniels* is also in conflict with other precedent within the Fifth Circuit itself. In *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995), a deputy sheriff spoke out and campaigned against his current boss in an election for a new sheriff. He was demoted after his boss won re-election. The deputy sued, claiming his rights of free speech were violated by the demotion. The Fifth Circuit reversed a grant of summary judgment for the city, stating: "In the present case... Sheriff Lopez has failed to allege that the deputy's political activities had any effect whatever on [the department's] operations." Looking to the *Pickering* balancing factors, the court held "there is simply no

(continued...)

In *Rankin v. McPherson*, 483 U.S. 378, 388 (1987), the Court confirmed that in the absence of evidence that speech by a government worker on a matter of public concern "interfered with the efficient functioning of the office," disciplinary action resulting from that speech was unconstitutional.

All the way back to *Cantwell v. State of Connecticut*, *supra*, this Court has observed this sound policy rationale:

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.

310 U.S. at 308. The burden of proof rests with the state to demonstrate its restrictions are necessary to the fulfillment of important governmental interests, and reasonably targeted to achieving or promoting those interests. *Freedman v. Maryland*, 380 U.S. at 58-60; *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (burden to prove disruption justifying restrictions on constitutional rights is on the government/censor); *Tucker v. California Dep't of Education*, 97 F.3d 1204, 1209-1210 (9th Cir. 1996); *Dwen v. Barry*, 483 F.2d 1126, 1130-31 (2nd Cir.

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[4](...continued)
countervailing state interest to weigh against the employee's First Amendment rights." *Vojvodich*, 48 F.3d at 886. Why the Fifth Circuit in *Daniels* ignored its own very recent precedent is unknown. It is, however, obvious that its decision in Petitioner's case is directly contrary to its decision in *Vojvodich*.

1973). It is undisputed that the City has come forward with absolutely *no evidence* that it is attempting to further a legitimate governmental interest, or that the General Order is reasonably targeted to fulfill such a purpose.[5]

The Court in *Waters v. Churchill, supra,* addressed the constitutionally mandated scope of investigation an employer must undertake before disciplining an employee for arguably protected speech or expression. The plurality held that an employer must undertake a reasonable investigation of the speech or conduct involved, and only if the employer then reasonably believes that the speech is not protected may the employer fire the employee without further action. However, if the employer finds the speech is protected, then the employer must "tread lightly" and ensure that the *Connick* factors justify discipline. 511 U.S. at 677-78.

The Court stressed in *Waters*, "In many situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." *Waters*, 511 U.S. at 674 (citing *Connick*, *supra, Rankin, supra,* and *Pickering, supra*). Justice Souter, in concurrence, voiced the same concern:

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[5] It is possible the City may someday come forward with evidence that its officers wearing cross pins would "negatively impact" its mission of serving and protecting the public; doubtful, but possible. However, there is no such proof in *this* record, and the Court simply cannot "assume" that such facts exist in the absence of evidence. Indeed, Daniels argued that *no* such proof exists, and the City has (so far) failed to deny or counter that argument with any evidence whatsoever. It is thus the better presumption, especially on summary judgment, to presume that no such evidence will *ever* exist, and rule accordingly. The lower courts thus erred in overruling Daniels' "no evidence" motion for summary judgment, and should have granted that motion on the record presented. FED.R.CIV.P. 56(e).

> A public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression.

511 U.S. at 684 (Souter, J., concurring). *Waters* thus reiterates and confirms the basic premise that before a government employer may discipline its employees for arguably protected speech, that speech must be disruptive of the employer's mission or activities. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things *that detract from the agency's effective operation*, the government employer must have some power to restrain her." *Waters*, 511 U.S. at 675 (emphasis supplied). In Petitioner's case, the City has come forward with no evidence or cogent argument that the speech and conduct engaged in by Sergeant Daniels crosses this bare minimum threshold, and the City did not meet even the lesser burden of satisfying the first stage of the analysis articulated in *Waters*.

Inarguably, the General Order is not narrowly drawn to effect an articulated, important government interest. It is plainly aimed only at suppression of expression. The City has not argued (much less proven) that public safety, employee loyalty, department functionality, or the preservation of public peace and order justify the General Order. Rather, the City has only argued (but again not proven) "conservation of desirable conditions" as the goal of its enforcement. The General Order is unconstitutional. Because the Court of Appeals failed to properly apply the *Pickering* standard to require that Respondents demonstrate how Petitioner's speech would "materially or substantially disrupt" the police department's function, creating a conflict within the Circuits, certiorari should be granted.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS RELATING TO THE APPLICATION OF THE *OREGON EMPLOYMENT DIV. V. SMITH* "NEUTRALITY" REQUIREMENT TO MUNICIPAL PROHIBITIONS ON SYMBOLIC RELIGIOUS EXPRESSION BY UNIFORMED PUBLIC SERVANTS.

The Court of Appeals wrongly concluded that because the General Order only "incidentally affects Daniels's individual religious practice" it is "acceptable under *[Oregon Employment Div. v.] Smith*."[6] 246 F.3d at 505, App. at A9. This is demonstrably incorrect. The ruling in *Smith* has been strictly limited by subsequent Supreme Court cases to apply only in situations where a *single* Constitutional right is implicated by the challenged restriction. *City of Boerne, Texas v. Flores*, 521 U.S. 507, 513 (1997).[7] Therefore, since it is clear that Daniels has brought a so-called "hybrid" Constitutional challenge to the General Order, *Smith* is inapposite. The Court of Appeals' invocation of that precedent was error.[8]

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[6] *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990).

[7] Such a "single right" case might have been brought if Daniels' speech was not religious in nature. Here, however, Daniels' freedom of speech, his freedom of association, *and* his freedom to exercise his religion are at issue, making *Smith* off point.

[8] In recent years several members of this Court have called for rebriefing and reconsideration of the *Smith* precedent, mostly because that case is not only confusing but also possibly incorrect in its Constitutional analysis. *See, e.g.*, the dissenting opinion of Justices O'Connor and Breyer in *City of Boerne v. Flores*, 521 U.S. 507, 544-49 (1997), and the concurring opinions of Justices Souter,

(continued...)

Furthermore, the General Order is not a "neutral law of general application," and therefore the "incidental burden" standard of *Smith* cannot apply. There is ample evidence in the record that the Chief was far from neutral in his application of the General Order, and that he in fact discriminated against Sergeant Daniels on the basis of the religious nature of the symbolic speech he sought to express. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinance against animal sacrifice facially neutral but factually discriminatory against Santerian religion; ordinance declared unconstitutional). The unbridled discretion placed in the Chief by the General Order precludes the order from having "general application," because the existence of such discretion fosters an environment where the regulation may be applied in an uneven manner based on the personal preferences of the current chief and the particular speech at issue (which is what happened here).

The Court of Appeals cited for its reasoning only to a recent decision of its own court, a decision which conflicts with earlier and better-reasoned precedent from other circuits, thus creating yet another conflict in the circuits. SUPREME COURT RULE 10(a). The Fifth Circuit cited to *Green v. Polunsky*, 229 F.3d 486 (5th Cir. 2000), for the proposition that inmates who desired to wear beards as part of their religious faith could not do so even though other inmates with medical conditions were given such permission. Even

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[8](...continued)
O'Connor and Blackmun in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, at 570-71 (1993). The present case may provide this Court with a prime opportunity to re-evaluate *Smith* after full briefing of the issues relevant to these type cases. The main, troublesome issue under *Smith* is squarely and cleanly presented here.

if *Green* were germane and good law (which it is not), it is in direct conflict with the Third Circuit's decision in *Fraternal Order of Police Newark v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), *cert den.*, 528 U.S. 817 (1999), which held that once the government makes an exception for medical conditions, it has no "legitimate interest" in not allowing a similar exception based on religious belief. *Newark*, 170 F.3d at 366-67.

The *Newark* decision is the better reasoned one for several reasons. First, it is difficult to determine which exceptions are "legitimate" and which are not if government officials have unbridled discretion to decide, on a case-by-case basis, which will be allowed. Pretext and blatant discrimination can far too easily infect such a system of restraint.

Second, as with any "legitimate" restriction, the government must be attempting to advance some important state interest. If some people may engage in behavior that is contrary to that interest, then in the common seismical words of Justice Kennedy, "a law cannot be regarded as protecting an interest 'of the highest order'... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye*, 508 U.S. at 547, quoting *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (Scalia, J., concurring in part and concurring in judgment). Said differently, if some persons are allowed to act "contrary to" an important interest sought to be protected (regardless of reason or motive), then the interest is – by definition – no longer being "protected." Therefore, one cannot enforce the prohibition against those who also seek to act contrary to the interest albeit with differing (perhaps religious) motives without risking unconstitutional viewpoint discrimination.

Here, it is undisputed that other officers of the Arlington police department wore various ornamentation on their uniforms during the

same time period Sergeant Daniels sought to wear his cross.[9] And regardless of whether the Chief gave his express written consent, his verbal consent, his tacit "look the other way" consent, or was just blind to the fact that numerous pins were being conspicuously worn by his officers, it is still true that any supposed and hypothetical "interest of the highest order" sought to be protected by the General Order was not being protected. It is thus constitutionally suspect that Daniels' behavior was singled out for special, disparate treatment under the guise of "advancing" that interest.[10] The refusal

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[9] On summary judgment, the Court must accept these facts, and their reasonable presumptions, as true. FED.R.CIV.PROC. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). This means our analysis must consider that the Chief had *expressly and intentionally* allowed these other pins to be worn (albeit not in writing), since that is a reasonable presumption from the facts presented, irrespective of the Chief's denial. Pointedly, the jury could disregard the Chief's recent, self-serving and contrary testimony, and find that Chief Kunkle had expressly authorized these other pins.

The Court of Appeals faulted Daniels for not bringing forth evidence (other than Daniels' own affidavit) that these other pins had been worn. But under controlling law, Daniels affidavit was sufficient to overcome the City's motion (*Celotex*, 477 U.S. at 324), and Daniels "need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit." *Celotex*, 477 U.S. at 328 (White, J., concurring).

[10] Interestingly, the Court of Appeals faulted Sergeant Daniels for seeking express leave to wear his cross pin. The court said Daniels was not given disparate treatment because no other officers' requests to wear their pins had been denied, and thus the Chief had

(continued...)

of the Fifth Circuit to recognize that the regime of standardless discretion established by the General Order was a quintessential "system of individualized exceptions" under *Smith*, creating a split of authority within the Circuits over the meaning of *Smith*, warrants review by this Court.

III. The Petition Should be Granted to Address the Fifth Circuit Court of Appeals' Radical and Constitutionally Untenable Declaration that the Expression of One's Religious Faith is Not a "Matter of Public Concern" Within the Meaning of *Connick v. Myers*.

The Court of Appeals held that Daniels' speech was not a matter of "public concern." *Daniels*, 246 F.3d at 503-04, App. at A6. This is contrary to Supreme Court authority, and conflicts with other Circuit Courts' definitions of the term "public concern."

This Court has held that speech related to issues of religion or religious belief is a matter of "public concern." *United States v. Nat'l Treas. Employees' Union,* 513 U.S. 454, 466, 473 (1995) (federal employees' speech, including one employee's public lectures on the Quaker religion, held protected as "matter of public concern"); *Rosenberger v. Rectors & Visitors of the Univ. of Virginia,* 515 U.S. 819, 845-46 (1995). This view is held by other

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[10](...continued)
not discriminated against Daniels by denying *his* request. 246 F.3d at 507, App. at A13. This misses the point. The discrimination did not come about from denial of Daniels *request* when other requests had been granted. The discrimination came about from the Chief allowing other pins to be *worn*, but not allowing Daniels to wear his cross. Whether or not other formal requests had been made is totally irrelevant.

federal circuit courts as well. *See, e.g., Tucker v. California Dep't of Education*, 97 F.3d at 1209-10; *Altman v. Minn. Dept. of Corr.*, 251 F.3d 1190, 1202 (8th Cir. 2001) (state employees' non-verbal religious statement in opposition to sexual orientation sensitivity seminar, consisting of silently reading their Bibles during class, held protected speech); *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995) (supervisor's religious speech in workplace such as prayer and quoting Bible verses held protected speech); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (*en banc*) (assuming state employee's decision to hold herself out as "married" to fellow lesbian and engage in religious marriage ceremony was protected speech).

Not only was its *conclusion* faulty, but the Fifth Circuit's *analysis* also runs counter to the proper analysis of the "public concern" issue. This Court described the proper analysis in *Connick v. Myers*, *supra*. There, the Court did not undertake the impossible task of attempting to determine how a statement might be a matter of public concern, as the lower courts did here. Rather, it looked at the individual statements themselves, and sought to determine whether they were of importance or interest only to other employees of the department (and hence of private concern). If not, such statements are matters of "public concern," basically by default. *Connick*, 461 U.S. at 147-48. *Cf. Rankin, supra*, at 386 (comment regarding personal wish that a would-be assassin had succeeded in killing the president was "plainly a matter of public concern," even though uttered by sheriff's department employee).

No tenable argument can be made that the speech of Sergeant Daniels was of concern only to members of the Arlington police department (as would be, for instance, a union pin, *cf. United States Department of Justice v. F.L.R.A.*, 955 F.2d 998, 1006 (5th Cir. 1992)). Rather, it is undisputed that Sergeant Daniels intended his speech to reach members of the public at large, for

their benefit, making that speech (under *Connick*) a matter of "public concern" as a matter of law. A full *Pickering* analysis was thus required. The lower courts refused to undertake such an analysis, and thereby erred.

The Fifth Circuit's notion that Daniels' speech "melded" with his job is likewise faulty. The court seemed to believe that simply because Daniels' speech was "intensely personal in nature" this meant there was some risk that citizens may perceive that message as the City's "endorsement" of Daniels' religious beliefs. This cannot be correct because it is backwards. If such speech is as "intensely personal" as the Panel suggests, this makes it *less* likely – not *more* likely – that members of the public would view it as the "officially-endorsed" position of the City. The Fifth Circuit and Respondents simply cannot have it both ways: the cross is so intensely personal as to elude a *Pickering* analysis, but is so public that it might be perceived as some sort of "official endorsement" of Christianity by the City.

If the Fifth Circuit's test is the correct one, then all speech by government employees while at work would be legally suppressible simply because it could be couched as "intensely personal" speech which may be viewed as the employer's "endorsement" of that employee's beliefs. This certainly does not give the public much credit for intelligence, since it assumes members of the public cannot distinguish between "private" and "official" statements.[11]

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[11] The Supreme Court has rejected the notion that public confusion can convert private speech into government endorsement of religion *six times* in the last twenty years, and has never held to the contrary. *See Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Capitol Square Rev. & Advis. Bd. v. Pinette*, 510 U.S.

(continued...)

Recently in *Good News Club v. Milford Central School,* 121 S.Ct. 2093, 2104 (2001), Justice Thomas, writing for the majority, reiterated this important principle from *Rosenberger,* 515 U.S. at 839: "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." When Chief Kunkle told Sergeant Daniels that he could not wear his cross because the Chief wanted his officers to remain "neutral," he was not treating religion in a neutral manner whatsoever. The First Amendment requires "neutrality" as between religion and non-religion. *Good News Club,* 121 S.Ct. at 2097; *Widmar v. Vincent*, 454 U.S. at 273; *Capitol Square v. Pinette, supra*; *Lamb's Chapel*, 508 U.S. at 393; *Rosenberger,* 515 U.S. at 839. If this were truly a neutral policy, then no pins that have any sort of personal, religious or national connotation would be permitted. If a tiny cross pin is to be regarded by the public as an official police endorsement of Christianity, then wearing a Mexican flag pin ought to be seen by the public as an official police endorsement of loyalty to Mexico over the United States. This sounds ridiculous, but that is exactly the point.

It is ludicrous to assume that thinking members of the public cannot distinguish personal jewelry from official ornamentation. The Chief did not fear "establishment of religion." Rather, he feared that religious jewelry might "offend" certain members of the public (his fears totally untethered to any facts, studies, complaints, etc.), and he acted on his own personal prejudices. Freedom of speech is protected by the Constitution even when (perhaps *especially* when)

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[11](...continued)
1307 (1993); *Rosenberger, supra*; *Good News Club, supra.*

the speech might offend. Why are government workers removed from the ranks of those of us who may freely speak?

In the *Pickering* analysis the court is obliged to undertake, there is no "weight" on the City's side of the scales; all the current evidence favors Sergeant Daniels. Because the lower courts did not properly identify Daniels' religious speech as addressing a matter of public concern in contravention of the Supreme Court's historic protection of religious speech, and because a proper *Pickering* analysis was thus not undertaken, certiorari should be granted to rectify the Fifth Circuit's radical departure from the Court's free speech jurisprudence.

IV. THE PETITION SHOULD BE GRANTED TO ADDRESS THE IMPORTANT AND NOVEL QUESTION OF WHETHER A MUNICIPAL POLICY THAT GRANTS A SUPERVISORY OFFICIAL UNBRIDLED DISCRETION TO CENSOR ANY FORM OF SYMBOLIC SPEECH BY AN EMPLOYEE OF HIS DEPARTMENT, INCLUDING "PUBLIC CONCERN" SPEECH, IS UNCONSTITUTIONALLY OVERBROAD

Although the arguments on this issue consumed a great deal of the briefs of the parties below, both the District Court and the Court of Appeals failed to address whether the unbridled discretion contained in the General Order renders that regulation unconstitutionally overbroad.

In *FW/PBS, Inc. v. City of Dallas*, this Court said:

> While prior restraints are not unconstitutional per se... *any system of prior restraint... comes to this Court bearing a heavy presumption against its constitutional validity....* [A]n ordinance which... makes the peaceful

> enjoyment of freedoms which the Constitution guarantees contingent upon *the uncontrolled will of an [government] official* – as by requiring [permission] which may be granted or withheld in the discretion of such official – *is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.*

493 U.S. 215, 225-26 (1990) (emphasis supplied). Justice White articulated the rule perfectly:

> Unbridled discretion with respect to the criteria used in deciding whether or not to grant a license is deemed to convert an otherwise valid law into an unconstitutional prior restraint.... That rule reflects settled law with respect to licensing in the First Amendment context.

FW/PBS, 493 U.S. at 246 (White, J., concurring and dissenting) (emphasis supplied).

Numerous Supreme Court cases have consistently held that when a government regulation vests unbridled discretion in a government official to restrict the speech of citizens (as the Arlington General Order admittedly does), that regulation fails constitutional muster as being overbroad. "At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 782 (1988). The regulation imposed by the City of Arlington lacks standards which are the "guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." *Plain Dealer,* 486 U.S. at 758.

In *Plain Dealer*, the City of Lakewood, Ohio passed an ordinance giving the mayor "unbridled discretion" to deny permits for placing newspaper stands on public property. The Supreme Court never reached the first amendment freedom-of-the-press issue presented. The case was decided solely on the discretion given to the mayor unilaterally to make permit decisions. That discretion caused the ordinance to be facially unconstitutional:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. *This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.* As demonstrated above [citing numerous cases], we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, *because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.* Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, *it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion.*

Plain Dealer, 486 U.S. at 763-64 (emphasis supplied) (citations omitted). *See also Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (lack of guidelines "strongly suggests" the potential for arbitrary conduct and viewpoint discrimination); *Ohio Citizen Action v. City of Seven Hills*, 35 F.Supp. 2d 575, 577 (N.D.

Ohio 1999) (same); *Abel v. Town of Orangetown*, 759 F.Supp. 161, 165 (S.D.N.Y. 1991) (same).

This rule is not new. In *Saia v. New York*, 334 U.S. 558, 561 (1948), this Court held:

> The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine.

As in these prior cases – and for the same reason – the General Order here at issue offends the Constitution. "[T]he Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *Plain Dealer,* 486 U.S. at 760. The City of Arlington has not done this.

In the District Court, the City argued that because it was acting as "employer" and not as "government" a different standard should apply to its restrictions. Not so. "The First Amendment prevents government, except in the most compelling circumstances, from wielding its power to interfere with *its employees' freedom* to believe or associate, or to not believe and not associate." *Rutan v. Republican Party*, 497 U.S. 62, 76 (1990) (emphasis supplied). "Government as employer" enjoys no special exemption from the Constitution.

One reason unbridled discretion is unconstitutional relates to the very reason we have a Constitution and bill of rights in the first place: We, the people, do not trust the government. We have never allowed the great power of the state, which is so potentially destructive of our civil rights, to reside in the hands of lone

bureaucrats unless its exercise is subject to express, articulated due process standards informing that exercise. We have never trusted government officials to be wise, knowing and balanced in their control of the power we are of necessity required to yield to them, and historically we have excellent reasons to not trust them. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent").

The main reason for the requirement of standards is that citizens want their courts to be able to conduct enlightened review of the exercise of discretion vested in government officials. This task can only be intelligently undertaken if such discretion is bounded by objective, reviewable criteria or standards.[12] Here, it is undisputed that Arlington Police General Order 205.02(C)(2)(c) allows "unbridled discretion" to reside in the Chief of Police. The refusal of the Fifth Circuit to acknowledge that such a regime of standardless discretion is a constitutional infirmity that is redressable via a *Pickering* analysis merits review by the Supreme Court.

CONCLUSION

This case presents in stark relief the problem that *Oregon Employment Div. v. Smith* was bound to foster. Here, a government agency argues that it has a "law of general applicability" which allows a government official the unfettered discretion to

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[12] In the recent election contest between President Bush and then-Vice President Gore, the decision of this Court to halt the Florida recounts came down to the problem of standardless discretion vested in the county canvassing boards. Such unfettered discretion resulted in a violation of the equal protection clause of the Fourteenth Amendment. See *Bush v. Gore*, 531 U.S. 98 (2000)(*per curiam*).

discriminate and censor speech based purely on viewpoint, and to thus squelch the constitutional rights of citizens to freely speak, exercise their religion, and associate. Since it is "generally applicable," the government argues it may enforce the regulation and censor speech arbitrarily, discriminatorily, and totally free from judicial scrutiny even if the speech at issue has no potential for harm or disturbance of any kind.

The City, naturally, denies any motive of religious hostility. But that is just the point. It is impossible for us to determine the Chief's true motives or to determine whether the City has implemented and enforced the General Order for lawful or unlawful purposes. Motives are inherently difficult things to prove. That is why this Court has held on numerous prior occasions that before the government may restrict Constitutional rights, (a) its *means* of doing so must be truly "generally applicable," and (b) the restraint must be bounded by articulated, objective criteria so that its imposition may be scrutinized by the courts to determine whether it is being used as a device to foster a legitimate end, or as a charade to censor contrary viewpoints and unpopular speech. The City of Arlington has met neither of these requirements.

But an even greater danger is exposed by this case. *Smith* is being read by the lower courts as a proclamation that as long as a law can be pigeonholed into the category of being of "general applicability," the government is relieved of its obligation to show that the law actually fosters and protects a legitimate governmental interest. Surely this Court did not mean *Smith* to be read in such a superficial, knee-jerk manner. Given the history of strong protection for religious speech in the constitutional jurisprudence created by this Court, and given that this Court is the final guardian of our precious constitutional rights, there is no way any decision of this Court should be read to sanction such unbridled government "license" to restrict those rights without the government being

required to demonstrate, first, the existence of a legitimate, important state interest, and second, that its selected means is at least reasonably related to the goal of furthering that interest. Indeed, any such reading of *Smith* could result in a city passing an ordinance prohibiting all speech that discussed political parties or candidates. Such a law would undoubtedly be of "general applicability," but would also be so foreign to our constitutional jurisprudence as to be laughable.

But this is no laughing matter. Here, we have *exactly* that type of regulation. The City of Arlington has seen fit to allow its police chief the unfettered discretion to decide what, *if any*, speech may be engaged in by his officers. Depending upon who the Chief happens to be, this General Order could be used to censor either *no* speech or *all* speech of any type – political, religious, or even safety-related. The City should be required to show some legitimate purpose, some sound reason, why one whole segment of the population (police officers who wish to express their faith) should be prohibited from engaging in speech that is freely exercised by every other segment of the population. Government censorship cannot be condoned simply because the government assures us its motives are pure and its ends legitimate.

The lower courts are likely misreading *Smith,* and this is a grave problem. On the other hand, if they are reading *Smith* correctly, then we have an even *greater* problem. The Fifth Circuit's reading of *Smith* is contrary to the very idea of constitutional rights, since it allows the government – the very entity which the Constitution was designed to rein in – complete and unfettered license to restrict or destroy those rights with the stroke of a pen. This Court should

grant certiorari in this case in order to either clarify *Smith*, or toaddress which aspects of *Smith* remain viable law.

Respectfully submitted,

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July 30, 2001

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GEORGE DANIELS, Plaintiff-Appellant, versus CITY OF ARLINGTON, TEXAS; THERON BOWMAN, Chief of Police, Arlington, Texas, Defendants-Appellees.

No. 00-11191 (Summary Calendar)

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

246 F.3d 500

April 9, 2001, Decided

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

[*501]
WIENER, Circuit Judge:

Plaintiff-Appellant George Daniels appeals two rulings by the district court in this First Amendment employment case: the denial of his motion for partial summary judgment, and the grant of summary judgment in favor of Defendants-Appellees, the City of Arlington and its police chief (collectively, "the city"). Finding Daniels's claims to be meritless, we affirm the ruling of the district court.

I. FACTS AND PROCEEDINGS

Daniels was an Arlington police officer for thirteen years. While working in a plainclothes position, he began wearing on his shirt a small, gold cross pin ("the pin") as a symbol of his evangelical Christianity. He continued to wear the pin after he was reassigned to a uniformed position, which

brought him into conflict with Arlington Police Department General Order No. 205.02(C)(2)(c) ("the no-pins policy"). The General Order, as revised in November 1997, states that: "No button, badge, medal, or similar symbol or item not listed in this General Order will be worn on the uniform shirt unless approved by the Police Chief in writing on an individual basis."

Daniels requested in writing that then-Police Chief David Kunkle make an exception to the policy and allow him to continue wearing the pin on his uniform. Kunkle declined, writing to Daniels that "I have not authorized any non-department related pins and I do not intend to do so." Daniels refused Kunkle's order to remove the pin from his uniform shirt and did not respond to the police chief's offer of accommodations, which included: (1) wearing a cross ring or bracelet instead of the pin; (2) wearing the pin under his uniform [*502] shirt or collar; or (3) transferring to a non-uniformed position, where he could continue to wear the pin on his shirt. Daniels declined these alternatives and ultimately was fired for insubordination.

Daniels sued, claiming that the no-pins policy is unconstitutional on its face, and that he had been the victim of intentional religious discrimination. The district court rejected Daniels's claims: It denied his motion for partial summary judgment on the facial challenge to the regulation and granted the city's summary judgment motion, dismissing the remainder of Daniels's claims. He timely perfected his appeal of both decisions.

II. ANALYSIS

A. Standard of Review

This case is on appeal from a denial of partial summary judgment and dismissal on summary judgment. Therefore, we review the record de novo, applying the same standard as the

district court. n1 A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact. n2 An issue is material if its resolution could affect the outcome of the action. n3 In deciding whether a fact issue has been created, the court must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. n4

----------Footnotes----------

n1 *Morris v. Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir. 1998); see also *Bradshaw v. Pittsburg Indep. Sch. Dist.,* 207 F.3d 814, 816 (5th Cir. 2000) ("For purposes of appellate review, the 'inquiry into the protected status of speech is one of law, not fact.'") (quoting *Kirkland v. Northside Indep. Sch. Dist.,* 890 F.2d 794, 797 (5th Cir. 1989) (quoting *Connick v. Myers,* 461 U.S. 138, 148 n.7, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983))). n2 Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). n3 *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). n4 *Olabisiomotosho v. City of Houston,* 185 F.3d 521, 525 (5th Cir. 1999).

----------End Footnotes----------

The standard for summary judgment mirrors that for judgment as a matter of law. n5 Thus, the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence. n6 In reviewing all the evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as to the evidence supporting the moving party that is uncontradicted and unimpeached. n7

----------Footnotes----------

n5 *Celotex*, 477 U.S. at 323. n6 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2102, 147 L. Ed. 2d 105 (2000). [**5] n7 120 S. Ct. at 2110.

----------End Footnotes----------

B. Facial Challenge to the No-Pins Policy

Daniels asserts that Arlington Police Department General Order No. 205.02(C)(2)(c), one of many provisions regulating uniform standards for Arlington police, is an invalid prior restraint of speech protected by the First Amendment. He contends that the order is overbroad, impermissibly giving the police chief unfettered discretion to determine what expression may be displayed on an officer's uniform.

This argument is unavailing. As the district court correctly noted, "[a] police officer's uniform is not a forum for fostering [*503] public discourse or expressing one's personal beliefs." The Supreme Court has upheld appropriate restrictions on the First Amendment rights of government employees, specifically including both military and police uniform standards. n8 We reached the same conclusion in a case closely analogous to this one, *United States Dep't of Justice v. Federal Labor Relations Auth.* ("FLRA"), in which we upheld department regulations prohibiting border patrol agents from wearing union pins on their uniforms. n9

----------Footnotes----------

n8 See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986) (upholding against First Amendment challenge military uniform regulation barring wearing of yarmulke); *Kelley v. Johnson*, 425 U.S. 238, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976) (upholding police uniform and grooming standards). n9 955 F.2d 998 (5th Cir. 1992).

----------End Footnotes----------

The city argues that the deferential rational review standard should be applied to the Arlington Police Department's no-pins policy, a test it surely passes. n10 We need not decide whether that is the singularly applicable test, however, because the no-pins policy survives even the stricter standard for reviewing restrictions on government employee speech promulgated by the Supreme Court in *Pickering v. Bd. of Educ.* n11 The *Pickering* standard balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as employer, in promoting the efficiency of the public services it performs through its employees." n12

----------Footnotes----------

n10 See, e.g., *Kelley,* 425 U.S. at 239. n11 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). n12 *Id. at 568;* see also *Connick v. Myers,* 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Several circuit courts have applied the Pickering test to public employee claims involving religious speech or the free exercise of religion. See, e.g., *Lumpkin v. Brown,* 109 F.3d 1498, 1500-01 (9th Cir. 1997); *Brown v. Polk County,* Iowa, 61 F.3d 650, 658 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158, 134 L. Ed. 2d 189, 116 S. Ct. 1042 (1996) ("[Pickering] dealt with free speech rather than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of Pickering to the case at hand."); *Baz v. Walters,* 782 F.2d 701, 708 (7th Cir. 1986).

----------End Footnotes----------

In FLRA, we assumed that the speech involved was a matter of public concern, then applied the *Pickering* balancing test and concluded that the government's interest in promoting the efficiency of the services provided by its employees

outweighed the employees' interest in engaging in the protected speech. n13 We found that "a law enforcement agency's anti-adornment policy is [ ] entitled to deference when weighing the government's interest against the employee's interest under the *Pickering/Connick [v. Myers]* First Amendment test." n14

----------Footnotes----------

n13 955 F.2d at 1005-06. n14 *Id.* at 1006.

----------End Footnotes----------

We have used two tests, both derived from *Connick*, to determine whether speech relates to a "legitimate public concern." n15 Daniels fails both. The first, the citizen-employee test, turns on whether a public employee "'speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.'" n16 The second evaluates the content, form, and context of a [*504] given statement. None of these three factors favors Daniels's argument. The content of his speech -- symbolic conveyance of his religious beliefs -- is intensely personal in nature. Its form melds with the authority symbolized by the police uniform, running the risk that the city may appear to endorse Daniels's religious message. n17 The final factor, context, perhaps weighs most heavily against Daniels. Although the First Amendment protects an individual's right, for example, to shout, "Fire!" while riding a surfboard on the Pacific swells, it offers no such protection to the same speech uttered in a crowded theater. n18 Visibly wearing a cross pin -- religious speech that receives great protection in civilian life -- takes on an entirely different cast when viewed in the context of a police uniform. Although personal religious conviction -- even the honestly held belief that one must announce such conviction to others -- obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of

"public concern" as that term of art has been used in the constitutional sense. n19

----------Footnotes----------

n15 *Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 366 (5th Cir. 2000). n16 Id. (quoting *Connick,* 461 U.S. at 147). n17 See, e.g., *County of Allegheny v. ACLU,* 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989). n18 See *Schenck v. United States,* 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247 (1919) ("The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.") (citation omitted). n19 Contrast the religious message Daniels seeks to convey with the Supreme Court's characterization of the school funding question at issue in *Pickering*:

> The question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate.

391 U.S. at 571-72.

----------End Footnotes----------

Because Daniels's communication of his personal religious views through the pin is not speech addressing a "legitimate public concern," the departmental policy does not offend the First Amendment. Application of the *Pickering* balancing test is thus precluded. n20 Yet, even were we to follow the path we blazed in FLRA and assume arguendo that

Daniels's speech does involve a public concern, we would reach the same result. In FLRA, we held that "it is reasonable to conclude that allowing border patrol agents to wear union pins would interfere with an appearance to the public of neutrality and impartiality, which is important to the mission of all law enforcement agencies." n21

----------Footnotes----------

n20 See *Connick,* 461 U.S. at 146 (concluding that if employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge"); *Teague v. City of Flower Mound,* 179 F.3d 377, 383 (5th Cir. 1999). n21 955 F.2d at 1007.

----------End Footnotes----------

Although it is true that unions are secular and religions sectarian, the analogy between Daniels's case and FLRA is tight. As recognized in FLRA, the city through its police chief has the right to promote a disciplined, identifiable, and impartial police force by maintaining its police uniform as a symbol of neutral government authority, free from expressions of personal bent or bias. The city's interest in conveying neutral authority through that uniform far outweighs an officer's interest in wearing any non-department- related symbol on it. Daniels's facial challenge to the no-pins policy fails. [*505]

C. Grant of the City's Motion for Summary Judgment

Having reviewed de novo the legal claims Daniels asserts on appeal, we affirm the district court's decision to dismiss his case with prejudice on summary judgment.

1. First Amendment

For the reasons already discussed, the district court found that Arlington Police General Order No. 205.02(C)(2)(c) as applied to Daniels did not infringe his constitutional rights of free speech, expression, or association. The court also found that the no-pins policy is facially neutral and generally applicable, and only incidentally burdens Daniels's free exercise of his religion. Therefore, concluded the court, the rule is acceptable under the teaching of *Employment Div., Dep't of Human Resources of Oregon v. Smith.* n22

----------Footnotes----------

n22 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

----------End Footnotes----------

On appeal, Daniels appears to focus on a single sentence in which the district court stated: "Plaintiff's argument that wearing a cross on his police uniform is mandated by his religion is wholly without merit." Daniels is correct in arguing that it is improper for a court to assess what activities are mandated by religious belief. n23 Particularly when read in context with the court's pronouncement as a whole, we do not view this sentence as a comment on Daniels's religious beliefs, but rather as a rejection of the merits of his legal claim. Even if the court's perhaps-unfortunate phrasing allows for Daniels's interpretation, however, it does not undercut the validity of the conclusion that the no-pins policy does not target religion but only incidentally affects Daniels's individual religious practice, and thus is acceptable under *Smith.*

----------Footnotes----------

n23 See *id.* at 887 (warning that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim").

----------End Footnotes----------

Our conclusion that Daniels has not justified an exception to the police department's no-pins policy is analogous to the one we reached in rejecting a Muslim prison inmate's complaint after he was denied an exemption from the Texas prison policy requiring all inmates to be clean-shaven, even though wearing a beard was a tenet of his faith. n24 After noting that the grooming policy of the prison has a legitimate penological justification, we found that the policy does not violate Muslim prisoners' free exercise of religion, but "merely removes or reduces one of many avenues by which they may manifest their faith." n25 The same is equally true of Daniels's complaint: The no-pins policy serves a legitimate governmental purpose in the context of uniformed law enforcement personnel, and Daniels undoubtedly has myriad alternative ways to manifest this tenet of his religion.

----------Footnotes----------

n24 See *Green v. Polunsky,* 229 F.3d 486 (5th Cir. 2000). Inmates with medical conditions precluding shaving were allowed to wear short beards. n25 *Id.* at 491.

----------End Footnotes----------

2. Due Process and Title VII

The district court found that Daniels "presented no admissible evidence to suggest that he was terminated for the purpose of suppressing his rights protected by the First Amendment." The court therefore rejected his Due Process and Title VII n26 claims. Daniels contends that the accommodations offered by the city were unreasonable, presenting a fact issue on his Title VII claim. He also argues that he raised a fact issue as to Chief Kunkle's [*506] motivation, and whether Kunkle discriminated against religious speech.

----------Footnotes----------

n26 42 U.S.C.A. § 2000e-2(a)(1).

----------End Footnotes----------

We agree with the district court that Daniels presented no evidence that he had been terminated to suppress his First Amendment rights. Therefore, no genuine issue of material fact exists as to his claims under the Due Process Clause. n27 As for his Title VII claims, we find that Daniels met that statute's requirements for establishing a prima facie case of religious discrimination, having produced summary judgment evidence that (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) he informed his employer of this belief; and (3) he was discharged for failing to comply with the conflicting employment requirement. n28 With a prima facie case established, the burden shifted to the employer to show that it was unable reasonably to accommodate Daniels's religious needs without undue hardship. n29 This the city has done.

----------Footnotes----------

n27 See, e.g., *Bishop v. Wood,* 426 U.S. 341, 350, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); *Williams v. Texas Tech Univ. Health Scis. Ctr.,* 6 F.3d 290, 294 (5th Cir. 1993). n28 *Weber v. Roadway Express,* 199 F.3d 270, 273 (5th Cir. 2000); *Turpen v. Mo.-Kan.-Tex. R.R. Co.,* 736 F.2d 1022, 1026 (5th Cir. 1984). n29 *Turpen,* 736 F.2d at 1026; see also *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68, 93 L. Ed. 2d 305, 107 S. Ct. 367 (1986) ("By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.").

----------End Footnotes----------

The only accommodation Daniels proposes is unreasonable and an undue hardship for the city as a matter of law. A police department cannot be forced to let individual officers add religious symbols to their official uniforms. The record shows, furthermore, that Daniels failed to respond to the police chief's reasonable offers of accommodation. He cannot reject the city's good-faith efforts at accommodation because he did not fulfill his duty of cooperation. n30

----------Footnotes----------

n30 See, e.g., *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) ("Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer.").

----------End Footnotes----------

Finally, Daniels raised no fact issue as to Chief Kunkle's motivation. The undisputed facts show the opposite of pretext: The chief never denied that the cross is a religious symbol. The parties disagree only as to whether such symbols are appropriate accoutrements for police uniforms. Daniels's Title VII claim fails.

3. Equal Protection

Daniels also contends that genuine fact issues exist as to whether the city discriminated against religious speech by allowing other forms of symbolic speech. Daniels testified that he had seen, or heard about, many items of ornamentation worn on uniforms during his thirteen years with the Arlington Police. Former Chief Kunkle stated that before the no-pins order became effective in November 1997, he had approved pins promoting programs in which the city or police department directly participated, such as the DARE anti-drug campaign. In

1990, Kunkle had encouraged officers to wear red ribbons commemorating the 1985 slaying of federal drug agent Enrique Camarena. Daniels also points to his own affidavit, in which he stated that he attended a supervisory meeting in January 1997, in which Kunkle said he would not authorize the wearing of cross pins on uniforms because they "might offend someone." n31

----------Footnotes----------

n31 A contemporaneously prepared summary of a January 9, 1997, employee representatives' meeting states that any unauthorized pins were ordered removed: "Police officers must accept that their appearance must be professional and neutral and inoffensive to public sensibilities. Even seemingly inoffensive religious symbols are not to be worn where they can be viewed by the public because they may indicate to others hostility to their own religious beliefs."

----------End Footnotes----------

[*507] The district court nevertheless found that Daniels failed to produce any competent summary judgment evidence that the city discriminated against religious speech while allowing other forms of symbolic speech. In fact, the court found that the evidence showed Daniels was the only officer in the Arlington Police Department who had applied for an exception to the no-pins policy since its enactment. Viewing the facts and their inferences in the light most favorable to Daniels, we are convinced that he has not proven any disparate treatment or shown that any non-Christian pin request was approved or otherwise handled differently from his. He has created no genuine issue of material fact on this point.

4. Texas Laws and Constitution

The district court rejected Daniels's argument that the police chief's order to remove his pin from his uniform was unlawful under Texas law. The court held that the state constitution and laws, including the Texas Commission on Human Rights Act ("TCHRA"), afford Daniels no greater protection on his claims than does federal law, and that he was properly terminated for insubordination after refusing to comply with the chief's order.

Although Daniels assigns error to these conclusions, the Texas Supreme Court has held that the TCHRA is modeled on Title VII of the federal Civil Rights Act, and should be interpreted in the same manner. n32 Daniels's civil rights claims under the state constitution are similarly unavailing because tort damages are not recoverable for violations of the Texas Constitution. n33

----------Footnotes----------

n32 See *Chevron Corp. v. Redmon,* 745 S.W.2d 314, 316 (Tex. 1987, no writ); see also *Dallas Fire Fighters Ass'n v. City of Dallas,* 885 F. Supp. 915, 927 (N.D. Tex. 1995); *Grant v. Joe Myers Toyota, Inc.,* 11 S.W.3d 419, 423 (Tex. App. -- Houston [14th Dist.] 2000, no pet.) (evaluating TCHRA religious accommodation claim by applying federal interpretations of Title VII). n33 See *Gillum v. City of Kerrville,* 3 F.3d 117, 122 (5th Cir. 1993) ("Texas courts have not recognized a violation of Article I, Section 8, as an actionable constitutional tort."); *Favero v. Huntsville Indep. Sch. Dist.,* 939 F. Supp. 1281, 1296 (S.D. Tex. 1996), aff'd, 110 F.3d 793 (5th Cir. 1997) (rejecting claim for damages under Tex. Const. art. I, § 6); *City of Beaumont v. Bouillion,* 896 S.W.2d 143, 147 (Tex. 1995, writ denied) ("We hold there is no implied private right of action for damages arising under the free speech and free assembly sections of the Texas Constitution.").

----------End Footnotes----------

III. CONCLUSION

We discern no merit in any of Daniels's assignments of error. A police department does not violate the First Amendment when it bars officers from adorning their uniforms with individually chosen adornments, even when those decorations include symbols with religious significance. Therefore, the decision of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-11191

GEORGE DANIELS
Plaintiff - Appellant

v.

CITY OF ARLINGTON, TEXAS; THERON BOWMAN,
Chief of Police Arlington, Texas
Defendants - Appellees.

Appeal from the United States District Court for the
Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion 4/9/01, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for

Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GEORGE DANIELS	)
	)
VS.	) CIVIL ACTION NO.
	) 4:99-CV-549-Y
CITY OF ARLINGTON, TEXAS	)
ET AL.	)

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Defendants' Motion for Summary Judgment, filed April 20, 2000 [doc. # 22-2]. Having carefully considered the motion, response, and reply, the Court finds that the motion should be GRANTED.

The Court makes the following findings and conclusions:

1. For the reasons stated in this Court's Order Denying Plaintiff's Motion for Partial Summary Judgment, filed September 21, 2000, the Court finds that no genuine issue of material fact exists as to the constitutionality of the application of the City of Arlington Police Department's "no-pins" policy to the plaintiff under the freedom of speech, expression, and association clauses of the First Amendment. The Court concludes that Plaintiff's speech was not a matter of public concern, and thus not entitled to First-Amendment protection under the standard set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

2. The Court further finds that the application of the no-pins policy to Plaintiff did not violate rights under the Free Exercise Clause. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court ruled that no violation of the Free Exercise Clause occurs where an otherwise valid law or policy of general applicability interferes with a religious practice, provided the burden is not the object of the law but merely an "incidental effect." *See id.* at 878-79. Courts have relied upon *Smith* to uphold neutral governmental dress regulations that interfere with public employees' First Amendment rights to freely exercise their religion. *See, e.g., Seabrook v. City of New York*, No. 99CIV. 9134 (HB), 1999 WL 694265 (S.D.N.Y. Sept. 7, 1999), *aff'd*, 210 F.3d 355 (2nd Cir. 2000) (upholding policy requiring female correctional officers to wear pants in violation of their religious faith). The courts routinely have afforded great deference to law-enforcement and military regulations whose incidental effects burden the exercise of religious practices. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The Court concludes that Arlington's "no-pins" policy does not, on its face, implicate Plaintiff's free-exercise rights. As applied, the policy only incidentally burdens those rights. Plaintiff's argument that wearing a cross on his police uniform is mandated by his religion is wholly without merit.

3. The Court agrees with Defendants that Plaintiff has failed to come forward with any competent summary judgment evidence to suggest that Plaintiff's termination was motivated by a desire to curtail his exercise of his constitutional rights. This Court already has held that the chief of police may have unfettered discretion to determine what types of speech, if any, may be expressed as part of the police officer's uniform. Plaintiff has

presented no admissible evidence to suggest that he was terminated for the purpose of suppressing his rights protected by the First Amendment. For this reason, the Court concludes that no genuine issue of material fact exists as to Plaintiff's claims under the Due Process Clause and under Title VII of the Civil Rights Act. "No rational factfinder could conclude that the [city's] action was discriminatory. . . . [T]he plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination [has] occurred." *Reeves v. Sanderson Plumbing Prods.*, 120 S. Ct. 2097, 2109 (2000).[1]

4. The Court concludes that Plaintiff's claim under the Equal Protection Clause is without merit. There is no competent summary judgment evidence suggesting that Defendants discriminated against religious speech while they allowed other forms of symbolic speech. The evidence shows that Plaintiff was the only officer in the Arlington Police Department who ever applied for an exception to the no-pins policy.

5. The Court concludes that Plaintiff's conspiracy claim under 42 U.S.C. § 1985 fails because it does not allege that Plaintiff was the subject of racial animus. *See Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 757 (5th Cir. 1987).

6. The Court concludes that Plaintiff is not afforded any greater protection under the Texas constitution or under Texas law. The Court holds that the police chief's order requiring Plaintiff to

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1 Consequently, Plaintiff's claims fell under the Texas Commission on Human Rights Act. *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316-17 (Tex. 1987).

remove his pin from his uniform was a lawful order. Plaintiff's termination for insubordination after refusing to comply with that order was therefore proper.

Therefore, for the reasons stated above, the Court finds that Defendants' Motion for Summary Judgment is GRANTED. All claims in the above-styled and numbered cause are hereby DISMISSED WITH PREJUDICE.

SIGNED October 6, 2000.

/s/
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

TRM/val

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GEORGE DANIELS	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	4:99-CV-549-Y
CITY OF ARLINGTON,	§	
TEXAS, ET AL.	§	

ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending before the Court is Plaintiff's Motion for Partial Summary Judgment, filed February 14, 2000 [doc. #11-11]. Having carefully considered the motion, response, and reply, the Court finds that the motion should be DENIED.

I. FACTS

Plaintiff George Daniels was employed by the City of Arlington, Texas ("City"), as a police officer from August 1985 to September 1998. In 1997, Plaintiff, who considers himself a devout evangelical Christian, began to wear a small, gold cross on his shirt while working in a plain-clothes position. In January 1998, Plaintiff was reassigned to a position that required him to wear a uniform. He sought and was denied approval by the police chief to wear the cross on his uniform. Nevertheless, Plaintiff continued to wear the cross while on active duty. Some time later, Plaintiff was notified that he was in violation of the "no-pins" policy issued by the

City's chief of police in General Order No. 205.02(C)(2)(c), which reads:

> No button, badge, medal, or similar symbol or item not listed in this General Order will be worn on the uniform shirt unless approved by the Police Chief in writing on an individual basis.

(Def.'s App. at 4.) In addition to the written notification, the chief of police gave Plaintiff several warnings and finally an order to remove the cross from his uniform. The chief of police also provided Plaintiff with several permissible alternative means to express his faith, including wearing a cross on a ring or bracelet or agreeing to a reassignment to a plain-clothes position. After Plaintiff refused to remove the cross from his uniform, he was terminated in September 1998.

In the present motion for partial summary judgment, Plaintiff seeks a limited judgment by the Court that General Order No. 205.02(C)(2)(c) of the Arlington Police Department is unconstitutional on its face as an invalid prior restraint of speech protected by the First Amendment. Plaintiff alleges that the general order is overbroad, giving the police chief unfettered discretion to determine what types of individual expression may be displayed on an officer's uniform.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is proper when the record establishes that no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hill v. London, Stetelman, & Kirkwood, Inc.*, 906 F.2d 204, 207 (5th Cir. 1990). To determine whether an issue of material fact exists, the Court must first consult the applicable

substantive law to ascertain what fact issues are material to the disposition of the case. *Lavespere v. Niagara Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993). The Court must then review the evidence presented, viewing the facts and inferences drawn from those facts in the light most favorable to the nonmoving party. *Newell v. Oxford Management Inc.*,912 F.2d 793, 795 (5th Cir. 1990); *Medlin v. Palmer,* 874 F.2d 1085, 1089 (5th Cir. 1989). However, the Court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). Where the movant bears the burden of proof on a claim or defense, he must establish all elements of the claim or defense to prevail on summary judgment. *Western Fire Ins. Co. v. Copeland*, 651 F. Supp. 1051, 1053 (S.D. Miss. 1987), aff'd, 824 F.2d 970 (5th Cir. 1987).

When the moving party has carried its summary judgment burden, the respondent "must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585 (1986). The respondent must produce evidence, not merely argument, in response to a movant's properly supported motion for summary judgment. See *Foval v. First Nat'l Bank of Commerce,* 841 F.2d 126, 129 (5th Cir. 1988); *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987).

III. DISCUSSION

Government, in its role as government, is severely restricted by the First Amendment from placing restraints on speech. But when government acts as employer, the constraints of the First Amendment are less severe. In *Pickering v. Board of Education*,

391 U.S. 563 (1968), the Supreme Court delineated the constitutional restraints that exist on a public employer's authority to terminate employees for the type or content of their speech. The *Pickering* test requires the Court to balance "the interests of the [employee], as citizen, in commenting upon matters of public concern and the interests of the State, as employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568. Additionally, a public employee's speech is entitled to First Amendment protection only when that speech involves a matter of public concern.[1] See *Connick v. Myers* 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

The purpose of the *Pickering* balancing test is to ensure the "effective and efficient fulfillment of [the government's] responsibilities to the public." Id. at 150. "To this end, the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." Id. at 151. Particularly relevant to this concern is the nature of the

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[1] For purposes of ruling on the present motion for partial summary judgment, the Court need not decide whether Plaintiff's speech involved a matter of public concern as opposed to a matter of personal interest. Plaintiff's motion seeks only a declaratory judgment that General Order No. 205.02(C)(2)(c) is an unconstitutionally overbroad restriction of speech, regardless of its application. See *Scott v. Meyers*, 191 F.3d 82, 86 (2nd Cir. 1999); but See *Wilson v. City of Littleton*, 732 F.2d 765, 769 (10th Cir. 1984) (holding First Amendment did not protect police officer who wore black shroud across his badge to mourn death of officer from another town; not a matter of public concern).

employment relationships that would be jeopardized by the speech: "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Id.

The Supreme Court has emphasized that the state-interest element of the *Pickering* test "focuses on the effective functioning of the public employer's enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); see also *Jones v. Collins*, 132 F.3d 1048, 1053 (5th Cir. 1988) ("[T]he employee's interest in 'commenting on matters of public concern' must outweigh the public employer's interest 'in promoting the efficiency of the public services it performs through its employees.'") (quoting *Pickering*).

General Order No. 205.02(C)(2)(c) of the Arlington Police Department prohibits officers from wearing any button, badge, medal, or similar symbol on the uniform shirt without first obtaining written approval from the police chief. Obviously, the general order on its face restricts officers' expression on all subjects, involving matters of both public and private concern. The general order also gives the police chief unfettered discretion to determine what symbols, if any, may be worn on the uniform shirt. The Court must decide whether the general order, on its face, is unconstitutional under the *Pickering* standard.

In *Goldman v. Weinberger*, 475 U.S 503 (1986), the Supreme court upheld the application of an Air Force regulation to a Jewish serviceman who was prohibited from wearing a yarmulke while in uniform.[2] The Court stated that deference should be given to military uniform regulations when a public employee's First Amendment rights are at issue. Id. at 507. The Court deferred to the "professional judgment of the Air Force . . . that the traditional

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[2] The regulation prohibited servicemen from wearing headgear while indoors. See *Goldman*, 475 U.S. at 505.

outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank." Id. at 508. The military's need for "instinctive obedience, unity, commitment, and esprit de corps" outweighed the servicemen's interest in exercising his religious beliefs. Id. at 507.

The Fifth Circuit has applied *Goldman* to uphold disciplinary actions against INS agents who wore union lapel pins on their uniforms. See *United States Dept. of Justice v. FLRA*, 955 F.2d 998 (5th Cir. 1992). The court held that a law enforcement agency's anti-adornment policy is entitled to deference when weighing the government's interest against the employee's interest under the *Pickering* standard. See Id. at 1006. The court found that "allowing border patrol agents to wear union pins while on duty would create factionalism, interfere with discipline and create an appearance of partiality." Id. The court held that the INS's interest in promoting the efficiency of the border patrol outweighed the agents' interest in wearing union pins while on duty, justifying the "minimal intrusion" of the free-speech rights of union employees.[3] See Id. at 1007.

Other courts have recognized the interest of a governmental entity in preserving the appearance of impartiality. See *Thomas v. Whalen*, 51 F.3d (1285 (6th Cir. 1995) (upholding disciplinary action against police officer who made unauthorized public presentations on behalf of political organization while in uniform); *Paulos v. Breier*, 507 F.2d 1383 (7th Cir. 1974) (recognizing and protecting interest of municipality in preserving nonpartisan police

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[3] The court concluded that the agents could continue to express their support for unions "in myriad other ways." FLRA, 955 F.2d at 1007.

force and appearance thereof); *Detroit Fire Fighters Ass'n, Local 334 v. City of Detroit*, 508 F. Supp. 172 (E.D. Mich. 1981) (permitting city to restrict public appearance of uniformed fire-fighters to advocate defeat of proposed character amendment); *Connealy v. Walsh*, 412 F. Supp. 146, 158 (W.D. Mo. 1976) (upholding juvenile court's ban on partisan bumper stickers on employee cars).

Courts also have upheld numerous police grooming regulations on the basis that they were rationally related to the promotion of safety of persons and property. See, e.g., *Quinn v. Muscare*, 425 U.S. 560 (1976); *Weaver v. Henderson*, 984 F.2d 11, 13 (1st Cir. 1993); *Hottinger v. Pope Cty.*, 971 F.2d 127 (8th Cir. 1992); *Rathert v. Village of Peotone*, 903 F.2d 510 (7th Cir. 1990); *Marshall v. District of Columbia Gov't*, 559 F.2d 726 (D.C. Cir. 1976).

In the present case, the city asserts that symbols such as union pins and religious emblems worn on a police officer's uniform can create factionalism and the appearance of partiality to those persons who do not share that officer's political or religious beliefs. The Court concludes that the city's interest in fostering the appearance of a neutral police force is entitled to great deference. Moreover, the City's interest outweighs its officers' interest in expressing matters of public concern by wearing symbols on their uniforms. A police officer's uniform is not a forum for fostering public discourse or expressing one's personal beliefs. The City has a strong interest in preventing the appearance of endorsing particular viewpoints or religious beliefs. Succinctly stated, a uniform with a cross, a star, a crescent, or a political button attached to it is not a "uniform."[4]

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[4] See Webster's Ninth New Collegiate Dictionary 1290 (9th ed. 1991) ("of the same form with others: conforming to one rule or

The Court further concludes that the general order is only a minimal intrusion on the First Amendment rights of police officers. The regulation does not prohibit officers from wearing religious symbols apart from their uniforms while on active duty. For example, the regulation does not prohibit an officer's wearing a religious symbol on his ring or on his bracelet. Although wearing such a symbol in this manner would be just as visible and meaningful as wearing the cross on his shirt, the expression is more readily interpreted by others as a personal statement rather than as an official endorsement by the government.

The Court finally concludes that the grant of unfettered discretion afforded the police chief under the general order is constitutionally permissible. Plaintiff has cited no precedent suggesting that the government, when acting as employer must follow a set of quasi legislative guidelines to ensure that its administrative decisions satisfy the requirements of the First Amendment. Indeed, to ensure effective administration of the police department, the police chief must have final discretion to determine what shall constitute the uniform of the department.[5] The sole authority of the police chief to make exceptions to the general rule is wholly consistent with his administrative role. That role permits him to determine what speech, if any, may be expressed as part of the police officer's uniform.

Therefore, for the reasons stated above, Plaintiff's Motion for Partial Summary Judgment is DENIED.

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mode: CONSONANT").

[5] See, e.g., *Goldman*, 475 U.S. at 509 ("the desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.").

SIGNED: September 21, 2000.

_____/S/_____
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GEORGE DANIELS	§	
	§	
VS.	§	CIVIL ACTION
	§	4:99-CV-549-Y
CITY OF ARLINGTON,	§	
TEXAS, ET AL.	§	

FINAL JUDGMENT

Pursuant to the order issued this same day, and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that all claims in the above-styled and numbered cause are DISMISSED WITH PREJUDICE. All costs under 28 U.S.C. § 1920 shall be borne by the plaintiff.

SIGNED: October 6, 2000.

_____/S/_____
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Excerpt of Minutes of Non-Supervisory Employee
Representatives' Meeting, January 9, 1997,
page 3 (emphasis added)

Earrings, Knives, and Pins: Male commissioned personnel wear of earrings is not consistent with the professional image the department wishes to portray and are therefore prohibited while the employee is on duty or is acting in a law enforcement capacity. Similarly, the folding knives that some officers have begun using that clip to the pocket and are exposed to view are prohibited. All knives must be in a scabbard or concealed within a pocket. As to pins or other uniform accouterments, only those items specified in General Orders are permitted. *Deputy Chief Shipp is having a survey conducted to see what officers have been wearing (which now must be removed) and all items will be reviewed by command staff to determine whether or not they will be allowed on a case by case basis. Police officers must accept that their appearance must be professional and neutral and inoffensive to public sensibilities. Even seemingly inoffensive religious symbols are not to be worn where they can be viewed by the public because they may indicate to others hostility to their own religious beliefs.*

ARLINGTON POLICE DEPARTMENT
INFORMATIONAL MEMO

TO: ALL POLICE PERSONNEL

FROM: DAVID M. KUNKLE, CHIEF OF POLICE

REF: RED RIBBON WEEK

DATE: OCTOBER 19, 1990

Sunday, October 21, 1990 is the beginning of Red Ribbon Week, a week that commemorates the brutal slaying of Federal Drug Agent, Enrique Camerena, in 1985. During this week, citizens all across the country will demonstrate their commitment to leading a drug free lifestyle by wearing red ribbons.

The Police Department has been supplied with Red Ribbon Week ribbons, courtesy of the Arlington Medical Auxiliary. Each employee is encouraged to wear or display a red ribbon during the week to show their support for Red Ribbon Week and their commitment to lead a drug-free lifestyle. Ribbons will be distributed to the receptionist in I.S.B. and Administration, both patrol briefing areas, and the Training Center.

DEPOSITION
EXHIBIT
20

Supreme Court, U.S.
FILED
AUG 29 2001
OFFICE OF THE CLERK

No. 01-187

In The

Supreme Court of the United States

GEORGE DANIELS,

Petitioner,

v.

CITY OF ARLINGTON, TEXAS and
THERON BOWMAN, CHIEF
OF POLICE, ARLINGTON, TEXAS,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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FOREWORD

Citations to the Record on Appeal before the Fifth Circuit will be referred to as "Rec." followed by the page number to which the reference is made. Citations to the Appendix attached to the Petition for Writ of Certiorari will be referred to as "App." followed by the page number to which the reference is made.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Arlington, Texas and Theron Bowman, Chief of Police, Arlington, Texas, request that this Court deny the Petition for Writ of Certiorari ("Petition") of George Daniels ("Petitioner") seeking review of the Fifth Circuit's opinion in this case reported at 246 F.3d 500 (5th Cir. 2001).

STATEMENT OF THE CASE

Petitioner's Statement of the Case, Question Presented for Review, and Reasons for Granting Review contain two significant misstatements of fact.

First, contrary to Petitioner's rendition, the evidence in the summary judgment record does not show that the Police Chief ever approved or allowed items of personal symbolic expression to be worn by uniformed police officers. The record reflects that the City has a written policy which is intended to strictly control the appearance of uniformed police officers – it includes the so-called "no-pins" policy. [Rec. 208-212.] The Chief enforced these restrictions by meeting with employees and personally emphasizing the importance of a professional public image. [App. F1.] Moreover, there is no evidence that the Chief approved, or even had knowledge of the various personal items Daniels says he saw, or heard about, being worn by various officers during his thirteen years of employment. The Chief did not, and would not, approve any item that was not related to law enforcement. [Rec. 299.] Daniels was the only officer to make a written request to wear a personal item. [Rec. 295.] While his

request was denied, he failed to show that the Chief had given approval to any other officer to wear a personal item on his uniform. Petitioner admitted that he had no personal knowledge of items not listed in the General Orders being approved by the Chief. But, he relied entirely on his own conclusory, incompetent affidavit and misstatements of the Chief's deposition testimony in attempting to create a genuine issue of fact over Petitioner being "singled out." [Rec. 435, 482-84, and 534-35.] The district court and the Fifth Circuit both found no discrimination after reviewing the competent summary judgment evidence. [App. A11-13; C3.] Accordingly, Petitioner's characterization that "numerous pins were being conspicuously worn" and "allowed" by the Chief is inaccurate, misleading, and unsupported by the record. [Petition 18.]

Second, contrary to Petitioner's contention, the City did come forward with evidence of its legitimate governmental interest in regulating the appearance of its police uniform. [Rec. 214-215; 296.] The record reflects that the Chief articulated the desire to maintain the uniform as a symbol of neutral government authority, free from expressions of personal bias, in a well-disciplined, and professional police department. *Id.* He specifically cited his desire to prohibit items of personal expression not related to law enforcement as the basis of his decision to deny Petitioner's request to wear a cross on his uniform. Both the district court and the Fifth Circuit cited this evidence. [Rec. 296; App. A8; D7.] While the Petitioner may discount and challenge this rationale, it is inaccurate, misleading, and unsupported by the record to argue that this evidence was not proferred.

SUMMARY OF RESPONDENTS' ARGUMENT

The Petition for Writ of Certiorari should be denied. The uniform restrictions of the police department are content neutral and have a rational basis in promoting the efficiency of the department. Any effects the restrictions have on Petitioner's free speech or free exercise of religion are incidental. The Fifth Circuit was correct in holding that the restrictions pass constitutional muster under both the "rational basis" standard and "balancing of the interests" standard. Petitioner's complaints about the manner in which the *Pickering/Connick* "balancing" test was applied by the Fifth Circuit do not show a conflict between the circuits on any matter dispositive to this case. Petitioner's argument that a "strict scrutiny" standard should be applied to review police uniform regulations is meritless in the context of this public employment law case. However, if "strict scrutiny" is the applicable standard of review, the challenged restrictions meet this standard.

REASONS FOR DENYING THE PETITION FOR WRIT

I.

The Decision is Consistent With This Court's Prior Holding That a "Rational Basis" Standard is Applicable for Reviewing Restrictions on the Appearance of Uniformed Military and Police Personnel.

This dispute arose in the specific context of a City regulating the appearance of its uniformed police officers. The City has not adopted a rule regulating the dress of the general citizenry or even non-police municipal

employees. In this factually narrow context, this Court has given clear guidance on the appropriate analytical framework for reviewing claims that constitutional rights to free expression have been violated. In *Kelley v. Johnson*, 425 U.S. 238 (1976), this Court upheld police uniform and grooming standards against numerous theories of constitutional rights violations. Ten years later, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), this Court upheld military uniform regulations barring the wearing of a yarmulke from a First Amendment challenge.

The Fifth Circuit started its analysis in the present case by noting that the City "surely passes" the deferential "rational basis" review standard applied by this Court in *Kelley* and *Goldman*. [App. A5.] Accordingly, this case is properly resolved in favor of the City under these precedents. However, the Fifth Circuit also held that the challenged uniform restrictions survived the stricter standard for reviewing restrictions on government employee speech promulgated by this Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). [App. A5.] The *Pickering* standard balances "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the state, as employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see also Connick v. Myers*, 461 U.S. 138 (1983). While the Fifth Circuit reached the correct result, application of the *Pickering/Connick* test was clearly superfluous to the disposition of this case. The court applied the less deferential "balancing of the interests" standard of *Pickering/Connick*, in order to follow its analysis in *United States Dep't of Justice v. Federal Labor Relations Auth.*, 955 F.2d 998 (5th Cir. 1992) (upholding

regulations prohibiting Border Patrol agents from wearing union pins on their uniform).

Because the Fifth Circuit was correct in recognizing that *Kelley* and *Goldman* were controlling Supreme Court precedent, and Petitioner has not cited and discussed these cases in his Brief, this Petition should be denied.

II.

The Fifth Circuit Assumed *Arguendo* That Petitioner's Religious Expression Was a Matter of Public Concern Protected Under *Pickering*.

The City's police uniform standards do not, on their face, target free speech or religious expression. The district court and Fifth Circuit agreed that the restrictions were facially neutral. On these facts, it is not necessary to apply the *Pickering/Connick* "balancing" standard. The deferential "rational basis" standard is appropriate, as discussed above. Nevertheless, recognizing that a "balancing" test has been applied by numerous courts to review various restrictions placed on speech of public employees, the Fifth Circuit used it as a doctrinal framework in this case. The Fifth Circuit first addressed whether Petitioner was engaging in speech relating to a "legitimate public concern" by symbolically expressing his religious affiliation. [App. A6.] The court noted that Petitioner's speech in "content, form, and context" was intensely personal and not a matter of public concern. *Id.* But, the Fifth Circuit went on to assume, *arguendo*, that Petitioner's speech did involve a public concern. In other words, the case was not decided on this issue. For this reason, the Petitioner fails to show that the decision is in

conflict with the decision of any other circuit finding religious expression to be a matter of public concern under *Pickering*. The Fifth Circuit's determination that Petitioner's speech was not on a matter of public concern is well reasoned, but did not decide the outcome of the case.

Moreover, the Petitioner's argument that the lower courts erred by refusing to proceed with a full *Pickering* analysis is incorrect. [Petition 21.] It is clear that, while both the district court and Fifth Circuit did not find Petitioner was speaking on a matter of public concern, both courts went on to balance the interests of the parties in order to determine whether the challenged restrictions were constitutionally permissible. [App. A8; D5-8.] Accordingly, no conflict in decisions exists between the Fifth Circuit and other circuits over whether the *Pickering/Connick* standard should be applied in cases that involve the religious speech of public employees. For this reason, the Petition should be denied.

III.

Petitioner Misstates the Law By Confusing Standards for Reviewing Government Censorship With Standards for Justifying Speech Restriction On Government Employees.

The lower courts did not accept Petitioner's argument that the proper test for reviewing the City's police uniform regulations should be "strict scrutiny." Nor did the Fifth Circuit apply the censorship analysis Petitioner argued was appropriate to attack the alleged "unfettered" discretion of the Police Chief to control the appearance of

the City's police uniform. Now, Petitioner argues in the public employment law framework of *Pickering/Connick* that the City must establish that the forbidden conduct "materially and substantially interfere[s] with requirements of appropriate discipline." [Petition 9, *citing Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969), *citing* to *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).] Additionally, Petitioner contends that the City must "establish neutral criteria to insure that the licensing decision is not based on the context or viewpoint of speech being considered." [Petition 26, *citing City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 782 (1988).]

Petitioner, however, is wrongly grafting the First Amendment jurisprudence establishing the heavy burden of the government in the context of censorship cases, and is attempting to apply it to the City under the *Pickering/Connick* test. The teaching of this Court in *Waters v. Churchill*, 511 U.S. 661, 672 (1994), is contrary to Petitioner's argument. "Constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by government as a sovereign." *Id.* at 674. This is because, "the government interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as an employer." *Id.* at 675. The government cannot restrict the speech of the public at large just in the name of efficiency. But, where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. *Id.*

Petitioner fails to acknowledge that the record establishes the Arlington Police Department has a need for uniformity, discipline, and the appearance of neutrality and impartiality. [Rec. 213-15.] Under the applicable deferential basis standard, this rationale requires no evidence of harm to government operations in order to enforce uniform restrictions. *See Goldman*, at 508; and *Kelley*, at 248. Moreover, even under the stricter *Pickering/Connick* standard, this Court has "given substantial weight to government employers' reasonable predictions of disruption." *Waters*, at 673. (Deference given to government employer's prediction of harm used to justify restrictions on employee speech without evidence of tangible, present interference with the agency's operation.) Therefore, Petitioner's grafting "strict scrutiny" standards onto the City's burden under the *Pickering/Connick* test is contrary to the decisions of this Court. The Fifth Circuit correctly found that the City's interest in regulating the appearance of its police uniforms outweighed the interest of Petitioner to identify himself as a Christian by wearing a cross on his uniform. [App. A8.] Because the interests of the parties were properly balanced without applying "strict scrutiny" to the City's rationale for regulating the appearance of its police uniform, the Petition should be denied.

IV.

The "Rational Basis" Analysis of *Employment Division, Department of Human Resources of Oregon v. Smith* Was Properly Applied to Petitioner's Free Exercise of Religion Claim.

The Fifth Circuit held that Petitioner's free exercise of religion claim fits squarely within this court's decision

in *Smith*, 494 U.S. 872 (1990). The Arlington Police Department's uniform policy is a "valid and neutral law of general applicability," which proscribes conduct that Petitioner's religion allegedly prescribes. *Smith*, at 879. Therefore, the "rational basis" test under *Smith* should be used to evaluate his claim.

However, Petitioner argues that his case is a "hybrid" claim in which the "strict scrutiny" test applies. *See Smith*, at 881. In general, courts have not allowed parties to evade the holding of this court in *Smith* by simply asserting multiple claims. *See Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993); *Vandiver v. Hardin County Bd. of Ed.*, 925 F.2d 927, 933 (6th Cir. 1991); *Warner v. City of Boca Raton*, 64 F.Supp.2d 1272, 1288, n.12 (S.D. Fla. 1999). Otherwise, a creative pleader need only assert a variety of claims, thus creating a "hybrid" case triggering "strict scrutiny" analysis. By this tactic, "it would be extremely difficult to imagine any free exercise claim that would not fit into the 'hybrid' classification." *Waguespack v. Rodriguez*, 220 B.R. 31, 35-36 (Bankr. W.D. La. 1998). Thus, the *Smith* holding would be nullified and avoided by merely pleading multiple claims.

Instead, to assert a true "hybrid" claim, it is not sufficient to simply invoke another constitutional claim to trigger "strict scrutiny." *Swanson v. Gutherie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998). The plaintiff must show interference with an independently protected constitutional right. *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). At its core, Petitioner's claim is a free exercise claim in which he objects to regulations prohibiting his wearing a gold cross on his police uniform. He does not assert any other interference

with his right to speak or to exercise his religion. In this situation, his First Amendment free speech claim is indistinguishable from his First Amendment free exercise claim. Petitioner's own arguments confirm this because he uses both claims interchangeably in his Brief. Consequently, he cannot show an independently protected constitutional right, as required by this Court's holding in *Smith*, necessary to establish a "hybrid" claim.

Moreover, he has never clearly articulated or established his freedom of association claim. In order to establish a "hybrid" claim, he must at least establish a colorable separate claim. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Again, a plaintiff cannot force a "strict scrutiny" analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another fundamental right. *Miller*, at 1208.

Since Petitioner cannot show the violation of a distinct fundamental right, he cannot show that he has asserted a "hybrid" claim to preclude the application of the "rational basis" test dictated by *Smith*. Therefore, the Fifth Circuit was correct in considering his claim under the "rational basis" test. The police department clearly has a rational basis for the uniform rule, which promotes the neutral appearance of its officers. For this reason, his Petition should be denied.

Alternatively, the record shows that the City should prevail even under a "strict scrutiny" test. First, Petitioner failed to make a threshold showing that being restricted from wearing a cross on a police uniform is a substantial burden on his exercise of religion. Petitioner was afforded the options of: (1) wearing a cross ring or

bracelet instead of a pin on the uniform; (2) wearing the pin under his uniform shirt or collar; or (3) transferring to a non-uniformed position, where he could continue to wear the pin. [App. 2.] In light of these accommodations, the district court correctly found the City's "no-pins policy" to be only a "minimal intrusion on the First Amendment Rights of police officers." [App. D8.] This finding is consistent with the decisions of this Court. *See Hernandez v. Commissioner*, 490 U.S. 680, 699; and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 61 (1986).

Second, the Fifth Circuit recognized that the "form [of Petitioner's speech (the cross pin)] melds with authority symbolized by the police uniform, running the risk that the City may appear to endorse Daniels' religious message." [App. 6.] This Court has instructed, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the free speech and free exercise clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). By demanding that a police uniform be opened as a forum for free speech and free exercise, Petitioner seeks to create public confusion over the authority endorsed and represented by the symbol of an official police uniform. The City has a compelling governmental interest in preserving religious neutrality that justifies limiting Petitioner's freedom to practice his religion by wearing a cross on a police uniform. *See United States v. Board of Educ.*, 911 F.2d 882, 889 (3rd Cir. 1990). Thus, the record establishes that Petitioner failed to establish a substantial burden on his religious exercise, and the City established a compelling

government interest in restricting his personal modification to the police uniform. For these reasons, too, the Petition should be denied.

CONCLUSION

For all or any of the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August 29, 2001

(3)

Supreme Court, U.S.
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NO. 01-187

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE DANIELS,
Petitioner,

v.

CITY OF ARLINGTON, TEXAS AND THERON BOWMAN, CHIEF OF POLICE, ARLINGTON, TEXAS,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September 19, 2001

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

GEORGE DANIELS respectfully submits this Reply to the Brief in Opposition to his Petition for Writ of Certiorari, filed by Respondents City of Arlington, Texas and Theron Bowman.

I. CONTRARY TO RESPONDENTS' ARGUMENT, THE ISSUES RAISED IN THIS PETITION ARE NOT CONTROLLED BY *KELLEY V. JOHNSON* OR *GOLDMAN V. WEINBERGER*.

Respondents cite to *Kelley v. Johnson*, 425 U.S. 238 (1976), as authority for the actions taken by the Arlington Chief of Police. However, even a cursory reading of *Kelley* shows there is nothing similar about that case other than the fact that both cases concerned the appearance of police officers. If this were a case in which *appearance* were the issue, *Kelley* would be instructive. However, it is not.

Kelley involved a regulation about hair length on uniformed police patrolmen. Importantly, the plaintiff in that case was not claiming that wearing his hair long was a fundamental tenet of his religious faith or was symbolic speech of any kind; instead, he was merely claiming that his "liberty interest" under the 14th Amendment was impacted by the regulation.[1] Even more significantly, the

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[1] The Supreme Court in *Kelley* cast doubt on whether such a "liberty interest" even exists under the Constitution: "But whether the

(continued...)

defendant in *Kelley* made a convincing case that long hair could be a detriment to the efficient functioning of the department, that it could endanger the officer wearing it, and that it could thus endanger the mission of the department as well as other officers working with that officer.

Respondent accuses Petitioner of arguing the straw-man position advanced by the Court of Appeals in *Kelley*, to wit, that the state must come forward with convincing reasons for *any* regulation before it will pass Constitutional muster. *Kelley*, 425 U.S. at 247. This is not the case. Rather, Petitioner cites to the language of this Court in *Kelley*, asking that the City be required to come forward with some proof, however slight, that its regulation is designed to advance an interest the City is charged with protecting:

> Thus the question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, *and the promotion of safety of persons and property.*

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[1](...continued)
citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance." *Kelley*, 425 U.S. at 244. It is doubtful whether the City could make a convincing argument that Sergeant Daniels' freedoms of speech and religious expression enjoy no greater status than Officer Kelley's proclaimed "liberty" interest.

Id. (emphasis added). This point was emphasized by Justice Powell in concurrence: "When the State has an interest in regulating one's personal appearance, as it certainly does in this case, *there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation.*" *Id.* at 249 (emphasis added).[2]

This is the argument made all along by Petitioner in this case: that there is no evidence in the case showing a rational basis between the "no pins" regulation and "the promotion of safety of persons and property." The City has so far failed to produce evidence supporting even a rational basis for the regulation.

This Court gave instruction in *Kelley* regarding what evidence is required from both parties when a government regulation is at issue. Petitioner has faithfully followed the Court's lead in bringing and arguing the case. The Respondent, on the other hand, has not fulfilled its burden.

Finally, the Suffolk County's hair-length regulation was uniformly applied to everyone. There was no evidence that other officers were allowed to wear long hair while Officer Kelley was denied the same right. Here, Sergeant Daniels has convincing proof – ready for the jury – that Arlington police officers were allowed, even *encouraged,* by the Chief to wear other ornamentation but when it came to the Christian cross, the ordinance was suddenly sacrosanct and unbending. *Kelley* is off-point, and that is the only reason Petitioner did not address that case in his Petition.

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[2] Even more pointed were the remarks of the dissent in *Kelley*, 425 U.S. at 254, n.5.

Even further afield, Respondents cite to *Goldman v. Weinberger*, 475 U.S. 503 (1986), a case that did not even involve the civilian police, but rather the altogether different forum of the United States military. Significantly, the Supreme Court in *Kelley* dismissed the argument that civilian police are "paramilitary" in nature, calling it "correct" that civilian police are *not* afforded the same judicial deference accorded the military in matters of discipline and dress. *Kelley*, 425 U.S. at 246. Indeed, there are no cases from this Court analogizing regulations of civilian government employers to those used by the military, especially in matters of Constitutional jurisprudence. Again, Petitioner did not waste time addressing *Goldman* in his Petition solely because the case is factually and legally off-point.

II. RESPONDENTS' "PROOF" OF HARM IS UNSUPPORTED BY THE EVIDENCE

To their credit, Respondents do not expressly invoke the "slippery slope" argument in their brief. However, that argument is just under the surface of all of the City's claims of "harm."

On page 2 of their Brief, Respondents say: "the City did come forward with evidence of its legitimate governmental interest in regulating the appearance of its police uniform." For this, the City cites to Record at 214-15 and 296, which is nothing more than testimony and statements of the Chief that he wanted his officers to remain "neutral" (whatever that is) in their appearance. However, this is not evidence of a legitimate governmental *interest*; it is only another way of saying the Chief wanted to "preserve" what were in his mind "desirable conditions." To *properly* address the matter at issue, we must proceed at least one step further and ask: "Why does the department need neutrality and how does a cross detract

from or impugn that need?" In support, the City alleges (*sub voce*) that a cross on the uniform would demonstrate actual "bias" in the wearer. Clearly and admittedly there is no *evidence* in the record that anyone would perceive a police officer wearing a cross as "non-neutral" or "biased" or "undisciplined" or any of the other parade of horribles the City envisions and asks this Court to accept. Where is the City's evidence of "harm"?

The legal system is based on evidence, not conjecture and supposition. Summary judgment may only be based on substantial evidence. The City cannot tell the Court that it has "come forward with evidence of its legitimate governmental interest" and then provide the unbuoyed opinions and personal desires of its Chief as the only "evidence" to support that claim. Indeed, these statements are not evidence in any sense of the word. Surely, the City must at least prove that someone, even the Chief for that matter, actually felt that Sergeant Daniels *was* "biased" or "undisciplined" by the fact that he wore a cross on his shirt, and that the City fired him based on potential disruption to the City's routine. The City has not done so. Even Chief Kunkle *himself* testified that he would *not* perceive an officer wearing a cross as "biased."[3]

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[3] Kunkle Deposition, pp. 218, 221-22 (the actual record cite for this statement is no longer available, as the record has been returned to the District Court).

The City will no doubt say: even though Chief Kunkle *himself* did not feel that an officer wearing a cross would affect the officer's ability to be fair and impartial nor would his personal opinion of the officer suffer, it *might* affect the perception of fairness in some unknown, unidentified citizen. But, again, on the record now before the Court, that remains only Chief Kunkle's unsubstantiated, personal opinion:

(continued...)

In support of this point, the Court is referred to the recent case *Locurto v. Safir*, 2001 WL 987141 (2nd Cir. 2001). In that case, a policeman and two firefighters were fired for participating in a parade, allegedly while riding on a "racist float." The officers sued under section 1983, and the District Court denied dismissal motions filed by the City claiming qualified immunity. In affirming the ruling below, the Second Circuit set forth certain legal principles which are applicable to the summary judgment issues in this case. Relying in part on this Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Second Circuit, applying the balancing test set forth in *Pickering v. Bd. of Educ. of Will Township*, 391 U.S. 563 (1968), held:

> [A] government employer may fire an employee for speaking on a matter of public concern if "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for

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[3](...continued)

> Q: ...Now, the question becomes, your decision not to let him wear the cross was not based on whether that would impact his ability to be fair, neutral, or objective. It was based on your opinion that it might affect his perception in somebody's mind of being fair, neutral, or objective, right?
>
> A: Correct, but it was not – the decision with George Daniels was not specifically directed at the cross.

Id. This is strong evidence that there is no evidence supporting the City's position on this point.

its speech." *Jeffries v. Harleston*, 52 F.3d 9, 13 (2nd Cir. 1995). As this last element suggests, "even if the *Pickering* balance is resolved in the employer's favor, the employee may still demonstrate liability by proving that the employer disciplined the employee in retaliation for the speech, rather than out of fear of disruption." *Lewis [v. Cowen]*, 165 F.3d [154] at 163 [(2nd Cir. 1999)]; accord *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (noting "retaliation for the exercise of free speech" as an example of a claim for which an official's motive is a necessary element); *Sheppard v. Beerman*, 94 F.3d 823, 827 (2nd Cir. 1996).

Consequently, although the *Pickering* test presents a question of law, resolution of a First Amendment retaliation claim on a motion for summary judgment may not be possible if the plaintiff introduces sufficient evidence to create a genuine issue of material fact on the question of defendant's improper intent, which is a question of fact. *See Sheppard*, 94 F.3d at 278 (plaintiff may avoid summary judgment on First Amendment retaliation claim based on qualified immunity defense if he can show "particularized evidence of direct or circumstantial facts supporting his claim of unconstitutional motive).

Here, Petitioner has shown more than sufficient evidence that his firing was based on improper retaliation for his speech, and Chief Kunkle's motivation is thus a question of fact, even on the issue of qualified immunity. Summary judgment is not available to a defendant in these situations.

Since the City has no actual evidence that the cross pin would cause "bias" or would affect "discipline", the City leaves hanging in

the air the possibility that the cross may only be the first step, that eventually we will see smiley faces on uniforms, then swastikas. This is the *actual,* but irrational, fear the City expresses when it says the "no pins" regulation is meant to "maintain the uniform as a symbol of neutral government authority, free from expressions of personal bias." That fear, especially in its presently-unsubstantiated form, cannot be the basis for an intelligent discussion of the issues in this case, and certainly will not fulfill the City's high burden on summary judgment.

CONCLUSION

The City's arguments make no sense. It is nonsensical to contend that one police officer wearing a tiny, 1/4-inch gold cross on his uniform shirt would so detract from the mission or goals of the police department as to threaten "the promotion of safety of persons and property." It makes no sense that this cross pin would demonstrate to any reasonable, thinking citizen that the Arlington police department was "biased" against him or her in some unspecified, unarticulated way. It is unreasonable to postulate that this cross pin would turn a 14-year, highly-decorated police sergeant into a biased, undisciplined, unprofessional problem employee for his superiors to contend with. It makes no sense that this cross pin would actually cause reasonable members of the public to disrespect the officer wearing it or the police force in general. Yet, these are the City's arguments in their unvarnished state. All the City offers to support its case is conjecture, the ineffectual "slippery slope" argument, and the Chief's personal, unsubstantiated opinion that the wearing of a cross would or might detract from his perceived need to have a uniform "free from personal bias." Petitioner submits that ersatz "proof" of this nature

is insufficient as a matter of law to permit the termination of the employment of a dedicated public servant.

Petitioners respectfully submit that the Petition should be granted to address the judgments of the lower courts, or in the alternative, that the decision of the Fifth Circuit may be summarily reversed.

Respectfully submitted,

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